
[TRANSLATION]

Coastal Equipment Agencies Ltd. (*Plaintiff*) *v.* **The Ship "Comer"** *et al.* (*Defendants*)

Present: Noël J., in Admiralty—October 28, December 1, 1969.

Admiralty—Shipping—Admiralty Court—Jurisdiction—Necessaries supplied ship—Owner domiciled in Canada—Bankruptcy of owner—Action in rem by supplier against ships—Consent of Bankruptcy Court, whether necessary—Whether supplier a secured creditor—Whether action in rem creates maritime lien—Bankruptcy Act, R.S.C. 1952, c. 14, secs 2(r), 40(1) and (2)—Admiralty Act, s. 18(3)(a) and (b)—Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) s. 22(1)(a)(vii).

The owner of the three defendant ships, to which plaintiff had supplied necessaries, made a proposal under the *Bankruptcy Act*. Plaintiff brought actions *in rem* in this Court in Admiralty against the three ships and had them arrested. Defendants moved to annul the proceedings on the ground that the plaintiff was not a secured creditor and had not obtained leave of the Bankruptcy Court to commence proceedings, as required by s. 40(1) of the *Bankruptcy Act*. Plaintiff contended it was a secured creditor within s. 2(*r*) of the *Bankruptcy Act* and entitled under s. 40(2) to proceed without leave.

Held, defendants' motion must be granted for the reasons given in paragraph (2) *infra*.

(1) The right of the plaintiff to proceed *in rem* as in this case against a shipowner domiciled in Canada at the time action is commenced is governed not by s. 22(1)(*a*)(vii) of the *Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (U.K.) but by s. 18(3)(*b*) and (4) of our *Admiralty Act*. The prohibition contained in s. 18(4) against actions *in rem* for claims under s. 18(3)(*a*) does not apply to a claim for necessaries, which arises under s. 18(3)(*b*), in respect to which this court is clearly given jurisdiction by s. 18(3) of the *Admiralty Act* notwithstanding s. 22 of the U.K. statute. *Can. Imp. Bk. of Commerce v. McKenzie* [1969] 4 D.L.R. 405, disapproved.

(2) A supplier of necessaries to a ship does not have a maritime lien on the ship but at most a right of action *in rem* against the ship if it is still in the same owner's hands. That right of action gives no privilege, lien or preference of any kind and the supplier is in the same position as an ordinary creditor. Moreover, even if the action *in rem* and the seizure of the *res* could give the plaintiff a preference it did not do so in this case because the defendant ships when arrested were not in their owner's hands but in those of the trustee in bankruptcy. *Northcote v. Björn* (1886) 15 H. of L. 270; *The Beldis*, [1936] P. 51, discussed.

MOTION.

Raynold Langlois, for plaintiff.

Maurice Jacques, for defendants.

NOËL J.: By a motion filed in the three cases mentioned above, the defendants apply to this court for cancellation of the writ of summons, of the warrant for attachment and of the seizure of the three ships as made in all three instances.

The motion is based on the fact that the said ships are the property of Euclide Bouchard Ltée, which on June 11, 1969, i.e. before the service of the writs and the arrest of the vessels, filed a proposal under the provisions of the *Bankruptcy Act.* The plaintiff, according to the defendants, had a claim provable in bankruptcy, is not a secured creditor within the meaning of the *Bankruptcy Act* and did not obtain authorization by the court to institute these proceedings, as required by section 40(1) of the *Bankruptcy Act,* R.S.C. 1952, c. 14, reproduced hereunder:

> 40. (1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

This court would therefore not have jurisdiction to hear the present action.

Counsel for the plaintiff, on the other hand, claims that since his client had furnished the said ships with necessaries, the client is a secured creditor who can, if it so desires, avail itself of the provisions of section 40(2) of the *Bankruptcy Act,* which reads as follows:

> 40. (2) Subject to the provisions of section 48 and sections 86 to 93, a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders, but in so ordering the court shall not postpone the right of the secured creditor to realize or otherwise deal with his security, except as follows.

Indeed, counsel for the plaintiff cites as his authority section 2(*r*) of the *Bankruptcy Act* which, he says, is very comprehensive and even includes a lien or privilege such as the one he claims his client has for ensuring payment for the effects supplied to the three ships with which we are concerned.

The parties, through their counsel, admitted that the various items supplied, for which the plaintiff is claiming in the three actions, are not being contested for the purposes of the present motions and must, consequently, be considered to be supplies or "necessaries supplied to a ship" as provided for under section 18(3)(*b*) of the *Admiralty Act.*

Before we examine the nature of the rights of a claimant for necessaries supplied to a ship, such as those which the plaintiff claims to exercise in the three actions before this court—a question which it is very difficult to solve —it must first be decided whether such a claimant can bring an action *in rem* before our court in a case where the owner of the ship was domiciled in Canada at the time of the institution of the proceedings. If, in fact, we rely on section 18(2) of the *Admiralty Act,* which states that the jurisdiction of the Admiralty Court in Canada is re-enacted as in England by section 22 of the *Supreme Court of Judicature* (*Consolidation*) *Act 1925,* of the Parliament of the United Kingdom (Schedule A to the *Admiralty Act*), it would have to be said that the plaintiff could not bring the actions *in rem* which it has instituted against the ships for claiming the necessaries supplied elsewhere than at their home port since section 22(1)(*a*)(vii) states that such action is not possible when an owner or part owner of the ship was domiciled in England (the word "Canada" to be substituted for the word "England") at the time of the institution of the proceedings. Indeed, section 18(2) states that section 22 of the *Supreme Court of Judicature* (*Consolidation*) *Act, 1925* of the Parliament of the United Kingdom applies *mutatis mutandis* in Canada.

However, section 18(3)(*b*) and (4) of the Canadian *Admiralty Act* state the opposite, since they permit a claim for necessaries supplied to a ship to be made before the Admiralty Court even if an owner is domiciled in the country, as is the owner of the ships seized in the present actions, since the prohibition contained in section 18(4) does not apply to claims referred to in paragraph (*b*), which deals with claims for necessaries supplied to a ship.

It appears impossible to me, however, to accept the claim of counsel for the defendants to the effect that section 22(1)(*a*)(vii) of the *Supreme Court of Judicature* (*Consolidation*) *Act 1915* should decide this question for the simple reason that section 18(3) contains the following words: "Notwithstanding anything in this Act or in the Act mentioned in subsection (2) (i.e. section 22 of the *Supreme Court of Judicature* (*Consolidation*) *Act 1925*), the Court has jurisdiction to hear or determine ... (*b*) any claim for necessaries supplied to a ship". In fact, it appears clear that it is this section which applies to a claim for necessaries and not section 22 of Schedule A,

since pains have been taken to state clearly that this court has jurisdiction in the case, among others, of necessaries, notwithstanding section 22 of the English Act.[1]

We must now decide whether the plaintiff is a secured creditor who "may realize or otherwise deal with his security" according to the provisions of section 40(2) of the *Bankruptcy Act*.

In order to determine the rights which a claimant for necessaries supplied to a ship may have, we shall have to go fairly far back in English statutes and judgments dealing with this matter, since section 18(1) and (2) of the *Admiralty Act* simply state that the inherent and statutory jurisdiction in admiralty of the Court of Admiralty in Canada extends to and shall be over, subject to certain conditions:

> ... the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.

As we have seen, there is also a jurisdiction, under section 18(2), re-enacted as in England through section 22 of the *Supreme Court of Judicature (Consolidation) Act 1925* of the Parliament of the United Kingdom which applies *mutatis mutandis* in Canada.

However, before considering the rights of a claimant for necessaries supplied to a ship, it would be useful to mention the basic rule concerning the exercise of jurisdiction before our court, which is found in section 19(2) of the *Admiralty Act* and which reads as follows:

> 19. (2) Subject to subsections (3) and (4) of section 18 and subsection (1) of section 20, the Admiralty jurisdiction of the Exchequer Court may be exercised either in proceedings *in rem* or in proceedings *in personam*.

However, this section hardly helps us discover the nature of the right which the claimant for necessaries supplied possesses. In fact, it will be necessary, in order to discover the nature of that right, to go back to English statutes and old judgments.

In 3 & 4 Victoria, c. 65, (The Admiralty Court Act, 1840) section 6, it is stated:

> ... That the High Court of Admiralty shall have Jurisdiction to decide all Claims and Demands whatsoever ... for *Necessaries* supplied to any Foreign Ship or Sea-going Vessel, and to enforce the Payment thereof, ...

In *The Alexander Larsen,* (1841) 1 Wm. Rob. 288, at page 294, Dr. Lushington said about this Act and this section that:

> ... in the first place the statute does not create a lien upon the vessel at all; the debt has no foundation upon the statute ... The statute therefore simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred. Secondly, the Court having this jurisdiction conceded

[1] Moreover, it was because the Supreme Court of Prince Edward Island in *Canadian Imperial Bank of Commerce v. McKenzie et al* [1969] 4 D.L.R. 405 did not realize that the prohibition in section 18(4) of the *Admiralty Act* did not apply to a claim for necessaries that it declared that the order of the District Judge in Admiralty has been made without jurisdiction.

> to it would be bound to exercise that jurisdiction equitably; and in so doing it would protect the interests of all persons having a *bona fide* lien upon the property; as, for instance, subsequent purchasers without notice.

According to this decision, the statute in question would not confer any lien on the supplier of necessaries and would do nothing other than give the Admiralty Court jurisdiction to require or effect payment thereof.

Section 5 of the *Admiralty Court Act 1861*, (24 & 25 Vict. c. 10) passed a few years later, decreed that:

> The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the Port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales....

Section 19(2) of the *Admiralty Act* closely resembles section 35 of the above Act (24 & 25 Vict. c. 10), which says that "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*".

In *The Beldis*, [1936] P. 51, at page 75, the President declared the following about section 35:

> When, therefore, by s. 35 of the Admiralty Court Act of 1861 Parliament enacted that the jurisdiction conferred by that Act upon the High Court of Admiralty might be exercized either by proceedings in rem or by proceedings in personam it was merely enlarging the jurisdiction, but was not changing the forms of action by which that jurisdiction might be exercised.

This decision does not enlighten us any further on the nature of the right of the claimant for supplies and, consequently, we have to proceed further in our examination of certain other subsequent English judgments. However, may we say in passing that the 1840 Act applied only to foreign ships, while the 1861 statute gave jurisdiction over claims for necessaries supplied to any ship, wherever it came from, on condition, however, that (1) the supplying of such necessaries did not take place in the ship's home port, and (2) that, on the date of the institution of proceedings, no owner of the ship was domiciled in the country.

It seems that at the beginning of the 19th century, as a result of prolonged rivalry between common law courts and admiralty courts in the United Kingdom, the categories of cases which could be dealt with in admiralty were limited to actions involving damages, lifesaving, seamen's wages, bottomry loans and other clearly defined cases. As a result of these restrictions, Parliament had to be asked to extend these actions and this is what was done in the 1840 and 1861 Acts (cf. *The Beldis*, [1936] P. 82.)

Afterwards, there were certain judgments to the effect that the 1840 Act gave a maritime lien for necessaries supplied to a foreign ship as in *Ella A. Clark* (1863) Br & L. 32, and *The Bold Buccleugh* (1851) 7 MOO P.C.

267, 284; Jervis L.C.J. even declared that a maritime lien and an action *in rem* are identical in their effects. It therefore seems that until delivery of the judgment in *The Heinrich Björn* (1885) 10 P.D. 44; (1886) 11 App. Cas. 270, it was recognized that a claimant for necessaries possessed a maritime lien under the 1840 Act. In *The Pacific* (1884) Br & L 243, however, where necessaries had been supplied to a British ship under the 1861 Act, Dr. Lushington decided that there was no maritime lien, since such a lien existed as soon as the debt was created, and not on the date of the court's intervention, as in the case of the lien created by the Act. In *The Troubadour* (1866) L.R. 1A & E. 302, Dr. Lushington reiterated that, until the action was instituted, a supplier of necessaries had no claim against the ship. It was then decided by the Privy Council in *The Two Ellens* (1872) L.R. 4 P.C. 161, that section 5 of the 1861 Act did not create any maritime lien. The Privy Council also declared in *The Rio Tino* (1884) 9 App. Cas. 356, that the *Vice Admiralty Courts Act* of 1863 did not give a maritime lien for necessaries. Finally, the Court of Appeal, and, on appeal from that Court's decision, the House of Lords, decided in *The Heinrich Björn* (*supra*) that section 6 of the 1840 Act did not confer a maritime lien on the supplier of necessaries to a foreign ship. Therefore, as a result of the last two decisions—*The Heinrich Björn* and *The Two Ellens* (*supra*)—it must be concluded that the above-mentioned statutes had not conferred any maritime lien on a supplier of necessaries although he was granted a certain statutory right *in rem*. Moreover, it was with respect to the appeal from *The Heinrich Björn* decision that the House of Lords, in *Northcote v. Björn* (1886) 15 H. of L. 270 at 275, declared:

> The question whether or not a maritime lien exists is a question of right not of jurisdiction or remedy. (*The Neptune*) (3 Knapp 94, 144). The words of the Act "shall have jurisdiction to decide and to enforce payment" do not expressly confer any lien, and no lien ought to be implied unless it is absolutely necessary. Where the legislature intended to confer a maritime lien it did so clearly and expressly: see 7 and 8 Vict. C. 112 s. 16 and the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) s. 191, and the Parlement Belge (5 P.D. pp. 197, 211).
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> Before the Act the Admiralty Court exercised its jurisdiction either in personam or in rem. It is not contended by the appellant that where it is exercised in personam a maritime lien is created, and it is inconsistent to say there is a maritime lien when the proceedings are in rem but not if, for the same matter, they are in personam.

Moreover, it is in this decision that the true nature of the remedy and the right that the supplier of necessaries possesses seem to have been determined. As a matter of fact Lord Watson, at pages 276 and 277, referring to the claim of the appellants for necessaries supplied to the Norwegian ship *Heinrich Björn,* which was moored in the Port of Liverpool, declares:

> The action is in rem that being as I understand the term a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, the proceeds or part thereof adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognizes. *We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien;*

and in that case the attachment of the ship, by process of the Court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor as from the date of the attachment. The position of a creditor who has a proper maritime lien differs from that of a creditor in an *unsecured* claim in this respect, that the former, unless he has forfeited the right by his own laches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action in rem unless at the time of its institution the res is the property of his debtor.

(The italics are my own.)

At page 278 Lord Watson concludes as follows:

I do not think it necessary to refer to authorities for the purpose of establishing that by the law of England persons who equip or provide necessaries to a ship in an English Port have no preference over other creditors, and have no lien upon the ship itself, for recovery of their demands. The law upon that point is clear. But the appellants rely upon the provision of s. 6 of the Act of 1840 as evidencing the attention of the legislature, not merely to give the Court of Admiralty jurisdiction to entertain claims for necessaries supplied to a foreign ship within the body of a country, but also to create a new incident of the claimant's right when he elects to sue in that Court. It seems to be the necessary result of the appellant's contention that the claimant, who is an *unsecured creditor without any preference, when he seeks to enforce his claim elsewhere, becomes by virtue of the Act, a creditor preferably secured when he brings an action in the Court of Admiralty.*

The whole provisions of the Act 3 & 4 Vict. c. 65 appear to me to relate to the remedies and not to the rights of suitors. Sect. 6 merely confers "jurisdiction to decide" certain claims which the Court of Admiralty had previously no power to entertain. That enactment enables every person having a claim of the nature of one or other of those specified in sect. 6 to bring an action for its recovery in the Admiralty Court, but it cannot in my opinion have the effect of altering the nature and legal incidents of the claim. It may be that at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action in rem, except at the instance of a plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the Bar appear to me to bear out that proposition; but assuming it to be well founded, I do not see how it can affect the present question, because it is admitted that the Court entertained actions in personam as well as in rem, and could, therefore, give an appropriate remedy in the case of a personal claim to which no maritime lien was attached. It was argued for the appellants that inasmuch as in sect. 6 claims for necessaries supplied are enumerated in connection with claims for salvage, and for damages arising from collision (which have been held to involve a maritime lien), it must be inferred that the legislature means that a right of lien should also be recognized in the case of a claim for necessaries. In my opinion it is impossible to derive that inference from the terms of the clause except by assuming, as Dr. Lushington seems to have done in the case of *The Flecha* (1 Ecc. & Ad. (Spinks), 438) that the main object of the Act was to assimilate the law of England to "the general law of the maritime states of Europe".

As I have already indicated, that appears to me to be an assumption inconsistent alike with the title and preamble of the Act and with the character of its provisions. Many foreign states whose systems of jurisprudence are based on the civil law, admit a maritime lien for necessaries, but the ground upon which the Courts of England have declined to recognize such a lien is not, in my opinion, that it is opposed to some rule or principle peculiar to English law, but that it is contrary to the general principles of the law merchant. The law of Scotland is to a great extent founded upon the civil law; yet in the case of *Wood v. Hamilton* (3 Paton Sc. App. Cas. 148) the Court of Session held that no hypothec existed for repairs or furnishings in a home port, being of opinion that the question ought to be determined not according to the civil law, but as in England, upon general principles of commercial law, and the judgment was, on appeal, affirmed by this

> House. To my mind it is scarcely conceivable that the legislature, if it had been their intention to assimilate our commercial law to that of the foreign states referred to by Dr. Lushington in the case of *The Flecha,* should have endeavoured to effect that object by confining the assimilation to suits instituted in the English Court of Admiralty.

(The italics are my own.)

Lord Bramwell then clearly refuted a proposition which had been repeated in several former judgments to the effect that there was jurisdiction in Admiralty only when there was a maritime lien, and that an action *in rem* could not be instituted without having a maritime lien, by declaring at page 283:

> But the decisions must be examined. I cannot help thinking that the confusion which exists in them is attributable to a notion that Admiralty jurisdiction only existed where there was a maritime lien so that to give jurisdiction was to give a lien. That the law was so, was stoutly contended before us; but ultimately, and most properly, that was given up, on the strength of authorities shewing beyond doubt that Admiralty jurisdiction exists and always existed where there was no such lien. Proceedings might be in personam without the res being affected. And when they were in rem, *though a security might be obtained for the payment of what was recovered, it might well be that there was no lien.*

(The italics are my own.)

In this same action, Lord Fitzgerald, at page 286, ended his remarks by saying that it must now be accepted that before 1840 the Admiralty Court had jurisdiction *in rem* for the purpose of bringing a claim against the owner, although there was no maritime lien, and also *in personam* in certain cases.

It appears from these decisions that the supplier of necessaries has no maritime lien on the ship so supplied, and we must now ask ourselves what exactly is the meaning of the "legal nexus" about which Lord Watson speaks in *Northcote v. Björn* (*supra*).

In *The Cella* [1888] P. 82, it is repeated at page 85 that Lord Bramwell had declared in *The Heinrich Björn* that:

> It is not, indeed, a maritime lien, which arises at the moment the claims come into existence, but it was a security arising at the commencement of this action in rem

and further on, at page 86, that

> It is true that in respect of the repairs done by the plaintiff, there was no maritime lien, but the Admiralty Division, nevertheless, has jurisdiction over such a claim as this and by s. 35 of the Admiralty Act 1861, that jurisdiction may be exercised by proceedings in rem, as was done in this case.

and also, at page 87:

> . . . though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatsoever may be adjudged by it to be due the claimant.

In *Foong Tai Co. v. Buchleister & Co.* [1908] A.2, 458 it was declared that a claim for necessaries does not give any right against the ship up to the time the action is instituted.

In *The Beldis* [1936] P. 51 the President, at page 65, referring to *The Heinrich Björn* (*supra*) declared:

> But it was held that there was no maritime lien for necessaries though it was recognized that a claim for necessaries would give a right to seize the ship for

which the necessaries had been supplied in an action in rem against owners on whose behalf the debt had been incurred. This right, however, did not relate back so as to be available against strangers to the claim for necessaries to whom the property in the ship had passed before action brought.

In the same case at page 72, the President, referring to the decision handed down in *The Dictator* [1892] P. 304, 313 declares:

> The point for decision in that case was whether in an action in rem, in which bail had been given to avoid an actual arrest, the res was or was not subject to execution by writ of fieri facias in respect of a sum recovered in excess of the award of the bail. Sir Francis Jenne held that the ship was not exempt from execution.
>
> After reviewing the early history of the action in rem, the learned President says: Actions beginning with arrest of the person became obsolete in practice, as Dr. Lushington says in The Clara in the last century, the last recorded instance being in 1780; and arrest of property merely to enforce appearance became rare or obsolete, though in theory, such arrest of the person or property would still seem to be permissible, per Fry L.J. in the Heinrich Björn. On the other hand, arrest of property over which a lien could be enforced became more common as the idea of a preexisting maritime lien developed and arrest of property in order to assert for the creditor that legal nexus over the proprietary interest of his debtor, as from the date of the attachment of which Lord Watson speaks in the Heinrich Björn grew up.

However, it is at pages 73 and 74 that we see the purpose of the action *in rem* and of the seizure of the ship which come within jurisdiction of Admiralty Courts. The President in fact declares therein that:

> By proceeding in rem the property in relation to which the claim has arisen, or the proceeds of such property when in Court, can be proceeded against, and made available to answer the claim. The method of proceeding is peculiar to Courts exercising Admiralty jurisdiction, and generally it is in order to avail themselves of the advantages thus afforded that suitors resort to their jurisdiction. But in cases where the plaintiff does not desire to proceed against the property, the method of proceeding in personam may be resorted to.

And at pages 73 and 74 the President, in this action, further defines the true objects sought by the action *in rem* instituted by a claimant who holds only a simple statutory lien when he says:

> I am inclined to think that the solution is to be found in the passage from the Introduction to the select Pleas in Admiralty quoted above. It will be recalled that Mr. Marsden draws the conclusion that arrest was mere procedure, and that its only object was to obtain security that the judgment should be satisfied. It may be that this was not the only, or indeed the primary, object and that the original object of arrest, as Mr. Roscoe suggested in the Introduction to which I have already referred, was to found jurisdiction at a time when any attempt to assume jurisdiction in personam was prohibited by the common law courts.

The President, pointing out that since arrest of the person or the property had long ago ceased to be necessary for giving the Admiralty Court jurisdiction which the common law courts refused it, added at page 75:

> Nor is arrest of property other than the thing in relation to which the claim arises[2], necessary in order to obtain security that the judgment shall be satisfied. It is true that unless the defendant appears to an action in rem, satisfaction of

[2] Because *The Beldis* case involved the seizure of a ship other than the one concerned in the action but belonging to the same owner and before passage of the new English statute of 1956, *The Administration of Justice Act* 1956, which permits the seizure or the arrest of any ship belonging to the same owner.

> the judgment is limited to the value of the res, but if the defendant appears, the action proceeds in personam as well as in rem. In such a case, as where the action is brought in personam in the first instance, execution can issue against any property of the defendant including any surplus value of the res over and above the amount for which bail has been given.

I must therefore conclude, after an exhaustive examination of the main decisions handed down on this subject, that the claimant for necessaries supplied to a ship has not maritime lien on the ship but, at the most, has a right to bring an action *in rem* against the ship if the ship is still in the hands of the same owner. Indeed, as we have seen, no lien was created by the Act of 1840, or by the Act of 1861, or even by the Act of 1891, or by any other subsequent United Kingdom or Canadian Act. However, the claimant for necessaries was conceded a certain right *in rem* which at certain times has been vaguely called a statutory lien.

In fact, as long ago as 1886 (cf. *The Beldis* (*supra*) p. 72) the remedy of the action *in rem* was given to creditors of the shipowner for maritime debts which were not secured or guaranteed by a lien and privilege, and in such case the seizure of the ship resulted in giving the creditor what was called a "legal nexus" over the property so seized from his debtor.

It seems to me that this right does not go beyond the right of an ordinary creditor suing and executing. This, moreover, it seems to me, is the meaning of the words expressed by Lord Bramwell in *Northcote v. Björn* (*supra*) when, dealing with actions before the Admiralty Court, he declared at p. 283:

> Proceedings might be in personam without the res being affected. And when they were in rem, though a security might be obtained for the payment of what was recovered, it might well be that there was no lien.

It would, indeed, be extraordinary for a claimant for necessaries who is an unsecured creditor without any preference to become a secured creditor merely by bringing an action *in rem* before the Admiralty Court.

As a matter of fact, examination of the above-mentioned Acts and decisions clearly indicates to us, that the action *in rem* and the seizure of the *res* in maritime law was initially only a mere procedural means used for ensuring the execution of the judgment and giving the Admiralty Court jurisdiction at a time when in the United Kingdom the action *in rem* was the only possible remedy before that Court (cf. *The Beldis* (*supra*) pp. 73 and 74). Indeed I do not see in any of the Acts or decisions on this subject anything which would permit me to say that this procedure confers any privilege or lien whatsoever, although the right to bring an action *in rem* against an inanimate object like a ship constitutes an extraordinary right and, in certain cases, one which is advantageous for the person who can avail himself of it.

This action *in rem,* however, does not give any privilege or lien or preference whatsoever, and the claimant for necessaries seems to me to be in the same position as an ordinary unsecured creditor. If he is an execution creditor, he will be entitled to his costs of action but his claim will be ranked only in accordance with the order of priorities set by law. In fact,

to give him, through the mere fact that he has a simple right of action *in rem,* a right and specific privilege which would deprive the same debtor's other creditors of exercising their claims against the property seized, especially after the corporation owning such property has made a proposal under the *Bankruptcy Act,* seems to me inacceptable and based on no legal text or judgment. In fact, this would be a serious blow to the principle whereby the property of a debtor is the security of his creditors.

It may be, as we have seen, that at some past time in the United Kingdom, for reasons of rivalry between the common law courts and the admiralty courts, an action *in rem* was given to the person who brought a maritime claim before the Admiralty Court in order to confer on the latter a certain jurisdiction in the matter, but we can see from judgments since that time that things have certainly changed and that the action *in rem* which may be brought before the admiralty courts in Canada, without the claimant's having a maritime lien, is no longer anything but a special procedure which permits him in the cases for which provision is made in section 18 of the Admiralty Act to exercise a remedy for recovering his claim against the *res* in the matters mentioned therein on condition that the *res* is still in the hands of the same owner. Finally, this leads me to say that even if the "legal nexus" mentioned in certain judgments really gave the claimant who brings an action *in rem* and who seizes the *res* any privilege whatsover, it was taken in this case about five months after the filing of the proposal made under the *Bankruptcy Act* and at a time when the ships seized were no longer under the control of their owner but in the hands of the trustee. Consequently, this "legal nexus" can no longer be exercised and the plaintiff can no longer avail itself of it, and this I see as an additional reason for sustaining the defendant's motions. It seems to me that the fact that the plaintiff instituted these actions agains the ships themselves without taking action against the owners or the trustee in no way changes the legal position of the parties. In fact, it does not seem to me that it is possible to proceed indirectly against the trustee in that way, by attacking only the property he holds in the general interest of the ordinary creditors, with more success than by proceeding against the owner or the trustee directly.

I must, therefore, cancel the writ of summons, the warrant for attachment and the seizure of the ships as made in the three instances, all with costs against the plaintiff. However, since the three motions were heard at the same time, there will be only one fee for counsel.